IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
Respondent	)	
	)	
v.	)	**No. SC 86488**
	)	
KANITA THOMAS,	)	
Appellant	)	

On Transfer from the Missouri Court of Appeals, Eastern District
From the Circuit Court for the Twenty-second Judicial Circuit,
City of St. Louis, Division 19,
Honorable Jimmie M. Edwards, Judge

Appellant's Substitute Brief

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JURISDICTIONAL STATEMENT

On charges of murder first degree and armed criminal action (L.F. 28-9) a jury convicted Kanita Thomas of murder in the second degree, sec. 565.021, RSMo, and armed criminal action, sec. 571.015, RSMo, and assessed punishment at 25 and 15 years respectively (L.F. 72-3).

On March 28, 2003, the Hon. Jimmie Edwards sentenced Ms. Thomas to serve these terms concurrently for a total of 25 years (L.F. 83-5, Sent. T. 12). Notice of Appeal was timely filed on April 7, 2003 (L.F. 88).

On December 7, 2004, The Court of Appeals Eastern District handed down its decision. Judge Glenn A. Norton wrote an opinion reversing the judgment with Judge George W. Draper concurring. Judge Lawrence G. Crahan, Jr., dissented on one issue comprised within Point II and certified the question to this Court pursuant to Rule 83.03.

STATEMENT OF FACTS

Kanita Thomas and Edward Anthony Jefferson (Anthony) were girlfriend and boyfriend. They shared a third-floor apartment on Bingham in St. Louis (T. 318-9, 427). On the night of December 2, 2001, Ms. Thomas visited her friend Tarynn Johnson. They were preparing to go to a party (T. 319). Ms. Thomas decided she wanted to dress up so they went to her apartment (T. 320). She started going through her clothes which were all over the house (T. 321). Anthony came in drunk and not in a good mood (T. 322-3). While Ms. Johnson was in the apartment he flipped the mattress over on the bed; at trial she had trouble remembering this (T. 339-40) and acknowledged that she'd been trying to block things out of her mind that night (T. 325, 336).

Anthony and Kanita started arguing (T. 323). He called her names like bitch and whore (T. 336). Ms. Johnson left the apartment and stood on the second floor landing (T. 325-6). Ms. Thomas came out once or twice and gave her a bag and a jacket to hold (T. 327-8, 356-7). Ms. Thomas emerged once again and said, or screamed, "I stuck him" (T. 328-9, 349-50). Anthony fell into the hallway, blood on his chest (T. 329-30).

Ms. Thomas started screaming, "Help, call 911!" (T. 330) A neighbor, Jamie Smith, found her kneeling over Anthony while Ms. Johnson was on the landing staring into space (T. 361-2). Ms. Smith called 911 and, on the dispatcher's advice, gave Ms. Thomas a towel and told her to apply pressure to the

wound (T. 364-5). Ms. Thomas was upset and kept trying to pick him up (T. 365). Ms. Smith asked who had one it; Ms. Thomas replied, “He left” (T. 365-6).

The defense tried to impeach Tarynn. Ms. Johnson testified that she saw Anthony fall but she told the grand jury that she only heard him fall (T. 346-7). She didn’t remember telling the police that she saw him come to the door and go back in; the state’s objection to the attempt to impeach her with this statement was sustained (T. 353-4). Defense counsel asked her if she’d ever been convicted of a crime. The prosecutor objected that she’d never been made aware of that (T. 354). Defense counsel said the information came from her client. The prosecutor admitted that her investigator hadn’t run all the witnesses’ records and she didn’t know if the witness had any convictions. The court sustained the state’s objection to the question (T. 355-6).

Officer Tillman arrived to find Ms. Thomas standing and looking at the victim (T. 265). Sgt. Wasem was told that the responding officer found her kneeling and applying pressure with a towel (T. 302). She told Tillman that Anthony had had an argument with another man who stabbed him and ran past her on the steps (T. 268-70). She was calm, with blood on her hands but no apparent injuries (T. 270-1, 287-8). Most of the blood was inside the apartment doorway (T. 272, 284-6, 311-2). The knife was in a pan in the kitchen sink (T. 286-7).

The medical examiner testified that the victim was five-feet-seven, 238 pounds (T. 391). He was acutely intoxicated with a BAC of .176 (T. 398-9). The cause of death was a wound four inches deep struck with a downward motion

which penetrated the pericardial sac and pulmonary artery (T. 395-6). A couple of inches below the wound was the scar of a similar wound (T. 393-4).

Ms. Thomas had administered this other stab wound on September 19. She told Officer Triplett at that time that Anthony had slapped and punched her (T. 378-9). She had minor abrasions over her eye and on her cheek (T. 380-1).

At the Homicide Office on Dec. 2 she told Sgt. Wasem that she and Anthony were breaking up (T. 292, 296). He slapped her once (T. 292). She got the knife and put it in her pants pocket (T. 293) because he beat her up once before (T. 306-7). A few days earlier he had thrown her clothes around the apartment (T. 304). He was drunk on Dec. 2 and told Tarynn Johnson to get the bitch out of there (T. 304-5). He threatened to "beat her [appellant's] ass" (T. 304). She tried to ignore him. As she was leaving he was saying something to her and she spun around and stabbed him in the chest (T. 293-4). She also said he came at her and she got scared and stuck him (T. 306); she didn't even realize she had stabbed him (T. 307). He was inside the apartment, at the doorway, and fell onto the landing (T. 311).

When the police pulled up the report on the September incident Ms. Thomas gave a brief statement that they had been arguing, a cousin called the cops and Anthony went to the hospital while she was arrested (T. 294-5). It was because of this and her fear of the police that she initially lied on Dec. 2 about who had done it (T. 297). She cried "somewhat" when she heard that he was dead (T. 303).

Defendant's Case

Delores Thomas, her mother, testified that Kanita was beaten up on Sept. 19 (T. 412) with three knots on her forehead, two black eyes, a swollen upper lip and blood in her hair (T. 413, 419). Anthony was sorry afterwards and promised never to hit her again (T. 414). Erica Thomas, a cousin, testified that she talked to Kanita on the phone during that incident and heard Anthony make threats, then scream when she stabbed him. Erica called the police (T. 421-3).

Kanita Thomas testified that Anthony was mad because he had seen her in a car with another man who was only a friend (T. 428-9, 454). He had never beaten her up before except on Sept. 19 (T. 447-8). He hit her with a shoe on that occasion (T. 475). Before Dec. 2 he threw her clothes around the apartment (T. 431-2).

While she and Tarynn were picking out clothes Anthony came home and said, "Bitch, don't say nothing to me" (T. 433-4). He dozed on the couch for a minute, then jumped up and said, "Get that bitch out of here" (T. 434-5). He paced the floor, stood in front of her and looked her in the eyes (T. 435). She asked why he treated her that way and he smacked her (T. 435-6, 463). She picked the knife up from on top of the radio. He said, "Bitch, you're going to eat that knife" (T. 436). She kept it in her hand while searching for a shirt to wear to the party (T. 436-7, 459-60).

He told Tarynn to get off the bed and flipped the mattress over to remove the clothes from it (T. 437, 479-80). Tarynn left. Kanita started to put on her work

uniform because she'd decided not to come back (T. 438-9). She took a bag of clothes and left. He shut the door on her head (T. 440) or heel (T. 467). She unlocked the door and went in just a little bit. He came forward with his fist up and said, "Bitch;" he would have hit her so she "jerked" the knife, telling him to get back. She jerked it twice and felt that it stuck him, but she had no intention of doing so (T. 440-1, 485-6). She was not aiming but trying to drive him back (T. 484). She had her arm over her face (T. 490). He was inside the doorway (T. 490-1). She panicked when he opened the door, and stepped back. If she had stepped forward he would have hit her; if she had stepped back too far she would have fallen down the stairs (T. 486-7, 490). He went back in and shut the door (T. 441).

She called his name and heard him say from inside, "the bitch." She heard the doorknob turn and started down the steps but when she turned he had come out with blood gushing from his chest (T. 441-2). Then he fell to the floor (T. 443). Tarynn was downstairs and couldn't have seen him fall; she lied when she said she did (T. 442, 468-9).

Ms. Thomas ran back up and held him, then knocked on a neighbor's door and asked her to call an ambulance (T. 433). On Ms. Smith's instructions she tried to find a towel but Ms. Smith finally gave her one instead (T. 444, 489-90). Panic induced her to tell the police someone else stabbed him (T. 445, 463).

Neither of them had talked about breaking up; she loved him (T. 445). She had no reason to kill him (T. 444); she was scared rather than angry, scared of

being hit (T. 448-9). She remained calm while he yelled at her (T. 451), not talking back (T. 479).

Appellant tendered instructions on involuntary manslaughter and self-defense, both of which the court refused (T. 503-5). The jury deliberated nearly four hours before returning guilty verdicts on the lesser offense of second degree murder, assessing punishment at 25 years, and armed criminal action, assessing punishment at 15 years T. 541, L.F. 72-3).

The verdicts were returned on January 29, 2003. The motion for new trial was timely filed on Monday, February 24 (T. 542, L.F. 4, 74). On March 28 the court sentenced appellant to concurrent terms of 25 and 15 years (L.F. 83-4).

POINTS RELIED ON

I

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S INSTRUCTION "A" ON INVOLUNTARY MANSLAUGHTER BECAUSE THERE WAS A BASIS IN THE EVIDENCE FOR ACQUITTING HER OF MURDER BUT CONVICTING HER OF RECKLESS HOMICIDE IN THAT SHE TESTIFIED THAT SHE JERKED THE KNIFE AT HIM WITH HER ARM OVER HER FACE, NOT INTENDING TO STAB HIM BUT TO WARD HIM OFF, AND THE JURY COULD HAVE FOUND THIS TO BE A CONSCIOUS DISREGARD OF AN UNJUSTIFIABLE RISK OF DEATH AND THAT HER CONDUCT WAS A GROSS DEVIATION FROM WHAT A REASONABLE PERSON WOULD HAVE DONE.

State v. Frost, 49 S.W.3d 212 (Mo.App. 2001)

State v. Hill, 17 S.W.3d 157 (Mo.App. 2000)

State v. Craig, 33 S.W3d 597 (Mo.App. 2000)

State v. Beeler, 12 S.W.3d 294 (Mo. Banc 2000)

Sec. 556.046.2, RSMo Supp. 2001

Sec. 565.025.2(1)(c) and (2)(b), RSMo 2000

Sec. 562.016.4, RSMo

Sec. 565.024.1(1), RSMo

II

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S INSTRUCTION "C" BECAUSE THERE WAS SUBSTANTIAL EVIDENCE OF SELF-DEFENSE IN THAT, VIEWED IN THE LIGHT MOST FAVORABLE TO THE DEFENSE, MS. THOMAS HAD A REASONABLE BELIEF IN THE NECESSITY OF USING DEADLY FORCE TO AVOID SERIOUS PHYSICAL INJURY DUE TO THE VICTIM'S THREATS AND BLOWS, PAST AND PRESENT, AND THE POSSIBILITY THAT HE WOULD TRY TO TAKE THE KNIFE AND USE IT AGAINST HER; SHE WAS NOT THE AGGRESSOR; AND THE JURY COULD HAVE FOUND THAT SHE DID ALL IN HER POWER TO AVOID THE CONFRONTATION BY STEPPING BACK BUT NOT RISKING A FALL DOWN THE STAIRS.

State v. Avery, 120 S.W.3d 196 (Mo. Banc 2003)

State v. Gaskins, 66 S.W.3d 110 (Mo.App. 2001)

State v. Reynolds, 72 S.W.3d 301 (Mo.App. 2002)

State v. Hayes, 88 S.W.3d 47 (Mo.App. 2002)

Sec. 563.031, RSMo

III

THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT ON VOLUNTARY MANSLAUGHTER BECAUSE THERE WAS A BASIS IN THE EVIDENCE FOR ACQUITTING MS. THOMAS OF MURDER AND CONVICTING HER OF ACTING IN SUDDEN PASSION BASED ON ADEQUATE CAUSE, IN THAT THE VICTIM'S QUARREL WITH HER, HIS PHYSICAL ASSAULTS, BELLIGERENT MANNER, AND MENACING STEP IN HER DIRECTION WITH A POSSIBLE VIEW TO HITTING HER OR TURNING THE KNIFE AGAINST HER WERE SUFFICIENT PROVOCATION TO SUBSTANTIALLY IMPAIR AN ORDINARY PERSON'S CAPACITY FOR SELF-CONTROL.

State v. Avery, 120 S.W.3d 196 (Mo. Banc 2003)

State v. Battle, 32 S.W.3d 193 (Mo.App. 2000)

State v. Fouts, 939 S.W.2d 506 (Mo.App. 1997)

State v. Craig, 33 S.W.3d 597 (Mo.App. 2001)

Sec. 565.023.1(1), RSMo

Sec. 565.002(1, 7), RSMo

Sec. 565.025.2(2)(a), RSMo

IV

THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO APPELLANT'S QUESTION TO TARYNN JOHNSON, WHETHER SHE'D EVER BEEN CONVICTED OF A CRIME, BECAUSE APPELLANT HAD AN ABSOLUTE RIGHT TO CROSS-EXAMINE ON THIS SUBJECT FOR IMPEACHMENT IN THAT THE QUESTION WAS PROPER IN FORM AND ASKED IN GOOD FAITH ON THE BASIS OF INFORMATION FROM APPELLANT, A FRIEND OF THE WITNESS. THE RULING DENIED APPELLANT HER CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESS AGAINST HER.

State v. Meyer, 473 S.W.2d 374 (Mo. 1971)

State v. Taylor, 118 Mo. 153, 24 S.W. 449 (1893)

State v. Owens, 628 S.W.2d 349 (Mo. 1982)

State v. Weber, 814 S.W.2d 298 (Mo.App. 1991)

Sec. 491.050, RSMo

Mo. Constitution, Art. I, sec. 18(a)

U.S. Constitution, Amendments VI and XIV

ARGUMENT

I

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S INSTRUCTION "A" ON INVOLUNTARY MANSLAUGHTER BECAUSE THERE WAS A BASIS IN THE EVIDENCE FOR ACQUITTING HER OF MURDER BUT CONVICTING HER OF RECKLESS HOMICIDE IN THAT SHE TESTIFIED THAT SHE JERKED THE KNIFE AT HIM WITH HER ARM OVER HER FACE, NOT INTENDING TO STAB HIM BUT TO WARD HIM OFF, AND THE JURY COULD HAVE FOUND THIS TO BE A CONSCIOUS DISREGARD OF AN UNJUSTIFIABLE RISK OF DEATH AND THAT HER CONDUCT WAS A GROSS DEVIATION FROM WHAT A REASONABLE PERSON WOULD HAVE DONE.

Appellant offered the following instruction patterned on MAI-CR3d 313.10 (L.F. 66, A4):

> As to Count I, if you do not find the defendant guilty of murder in the first degree or murder in the second degree, you must consider whether she is guilty of involuntary manslaughter in the first degree under this instruction.
>
> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about December 2, 2001, in the City of St. Louis, State of Missouri, the defendant caused the death of Edward Jefferson by stabbing him, and

Second, that defendant recklessly caused the death of Edward Jefferson,

Then you will find the defendant guilty under Count I of involuntary manslaughter in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of involuntary manslaughter in the first degree under this instruction.

In determining whether the defendant recklessly caused the death of Edward Jefferson, you are instructed that a person acts recklessly as to causing the death of another person when there is a substantial and unjustifiable risk she will cause death and she consciously disregards that risk, and such disregard is a gross deviation from what a reasonable person would do in the circumstances.

If you do find the defendant guilty under Count I of involuntary manslaughter in the first degree, you will assess and declare one of the following punishments:

1. Imprisonment for a term of years fixed by you, but not less than one year and not to exceed seven years.

2. Imprisonment in the county jail for a term fixed by you, but not to exceed one year.
3. Imprisonment for a term of years fixed by you, but not less than one year and not to exceed seven years and in addition a fine, the amount to be determined by the Court.
4. Imprisonment in the county jail for a term fixed by you, but not to exceed one year and in addition a fine, the amount to be determined by the Court.
5. No imprisonment but a fine, in an amount to be determined by the Court.

The maximum fine that the Court may impose is $5,000.

The state objected to the instruction as unsupported by evidence (T. 503). The Court's response to Appellant's argument suggests confusion:

> THE COURT: Well, I can tell you that our Supreme Court in its infinite wisdom thinks that it knows more about what is going on down here with these self-defense instructions and you may even have cause of action up there. I'm not sure whether the Appellate Court thinks the same.
>
> I'm putting all this on the record so that they get this Court's message with respect to how it really feels about their thoughts on the self-defense. This instruction will not be given. It will be denoted Instruction A. It will not be given. (T. 503-4)

Next appellant offered her self-defense instruction and the Court said, "I anticipate that this instruction is the reason we had that conversation" (T. 504). Be that as it may, the instruction was refused, Ms. Thomas preserved the error in her motion for new trial (L.F. 76-8), and the court denied that motion (Sent. T. 3).

Standard of review

Involuntary manslaughter is a lesser included offense of both first and second degree murder. Sec. 565.025.2(1)(c) and (2)(b), RSMo 2000. The court is obligated to instruct on a lesser included offense if there is a basis in the evidence for acquitting the defendant of the greater offense and convicting her of the lesser. Sec. 556.046.2, RSMo Supp. 2001.

The defendant is entitled to a requested instruction if it is supported by evidence and any inferences which logically flow from the evidence. The trial court must resolve all doubts in favor of instructing down; the appellate court must view the evidence in the light most favorable to the defendant. State v. Hill, 17 S.W.3d 157, 159 (Mo.App. 2000).

Submissible Case

Involuntary manslaughter is defined as recklessly causing the death of another person. Sec. 565.024.1(1), RSMo. Recklessness is the conscious disregard of a substantial and unjustifiable risk that death will result, which disregard is a gross deviation from the standard of care a reasonable person would exercise in the situation. Sec. 562.016.4.

Recklessness is not confined to unintentional or accidental acts, or to intentional acts with unintended results. It includes the conscious use of a weapon in intended self-defense when the act constitutes unreasonable force. State v. Beeler, 12 S.W.3d 294, 299 (Mo. Banc 2000).

Ms. Thomas told the police Anthony came at her and she got scared and stuck him without even realizing it (T. 306-7). She testified that he shut the door after her but she unlocked it and went in part way; he came toward her with his fist up saying "bitch" and she jerked the knife at him twice. She was not aiming at him; on the contrary she had her arm over her face (T. 484, 490). She had no intention of stabbing him (T. 440-1, 485).

Taken in the light most favorable to the defense, these facts exactly fit the definition of recklessness. Mr. Jefferson was unarmed but she feared him. In blindly lashing out with the knife she consciously disregarded a substantial and unjustifiable risk that she would kill him. The jury could have found that her conduct was a gross deviation from what a reasonable person would do in the same situation, such as warning him away by merely displaying the knife, or departing the premises.

Beginning with Beeler, 12 S.W.3d at 299-300, several cases have held that an involuntary manslaughter instruction is required by evidence that the defendant consciously fired a gun into a car in response to the threat, or perceived threat, of a weapon. State v. Battle, 32 S.W.3d 193 198 (Mo.App. 2000); State v. Davis, 26 S.W.3d 329 (Mo.App. 2000).

In State v. Hill, 17 S.W.3d 157, defendant testified that he was the victim of an unprovoked assault by a man who was much larger and highly intoxicated; he also described a movement by the victim which he took to be the prelude to an armed robbery attempt. Defendant told the police he did not mean to kill him. This Court held that he was entitled to an involuntary manslaughter instruction.

In State v. Craig, 33 S.W3d 597, 601 (Mo.App. 2000), the Court held that "there was a basis for a reasonable jury to have found that defendant was reckless because he responded to the threat of a knife by inflicting ill-aimed blows with an iron bar."

Ms. Thomas was in no doubt that Jefferson was unarmed (T. 471). However, he was highly intoxicated and much larger at five-feet-seven, 238 pounds (T. 391. 398-9). (The only indication of her size in the record is the pedigree information on the indictment (L.F. 7)—five-feet-seven, 175 pounds, or 63 pounds lighter.) He had slapped her, was calling her "bitch," had threatened to make her "eat that knife" (T. 436) and was advancing on her (T. 440). The jury could have inferred that her use of deadly force was unreasonable, her conduct intentional yet reckless. As the Supreme Court said in Beeler, "In sum, reckless conduct is not inconsistent with the intentional act of defending one's self, if in doing so one uses unreasonable force." 12 S.W.3d at 299.

Perhaps the closest case on its facts is State v. Frost, 49 S.W.3d 212 (Mo.App. 2001), where the defendant testified that she was warding off the sexual advances of the 77-year-old victim in whose house she was staying. She took the

knife and positioned herself in a chair, kicking at him as he approached. When he reached for her she jumped up and "stuck" him in the chest. 49 S.W.3d at 215. She told the police she wasn't trying to hurt him, only to get him to leave her alone. *Id.* at 218. The Western District reversed for failure to give an involuntary manslaughter instruction.

Finally, a jury could find that by covering her eyes with her arm and lashing out with the knife she recklessly disregarded the risk that she could inflict death. Similarly, in State v. Israel, 872 S.W.2d 647, 650 (Mo.App. 1994), the Court found that by covering his eyes and firing a gun the defendant consciously disregarded a substantial and unjustifiable risk of killing bystanders.

Ms. Thomas's "jerking" of the knife was undoubtedly an intentional act, but according to her testimony stabbing and killing him were unintentional. This fits the definition of recklessness as interpreted in Beeler and its progeny. The trial court committed reversible error in refusing the involuntary manslaughter instruction.

II

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S INSTRUCTION "C" BECAUSE THERE WAS SUBSTANTIAL EVIDENCE OF SELF-DEFENSE IN THAT, VIEWED IN THE LIGHT MOST FAVORABLE TO THE DEFENSE, MS. THOMAS HAD A REASONABLE BELIEF IN THE NECESSITY OF USING DEADLY FORCE TO AVOID SERIOUS PHYSICAL INJURY DUE TO THE VICTIM'S THREATS AND BLOWS, PAST AND PRESENT, AND THE POSSIBILITY THAT HE WOULD TRY TO TAKE THE KNIFE AND USE IT AGAINST HER; SHE WAS NOT THE AGGRESSOR; AND THE JURY COULD HAVE FOUND THAT SHE DID ALL IN HER POWER TO AVOID THE CONFRONTATION BY STEPPING BACK BUT NOT RISKING A FALL DOWN THE STAIRS.

The motion for new trial preserves the issue of the trial court's refusal (T. 504-5) of Instruction C (L.F. 74-6). There appear to be certain deviations from MAI in the offered instruction (A5-A6). First, the paragraph beginning, "If the defendant reasonably believed she was in imminent danger of harm…" applies only when there is no evidence of deadly force. MAI-CR3d 306.06, p. 306-9 (2002). Second, the paragraph on prior relationship omits the phrase, "You may consider the evidence in determining *who was the initial aggressor in the encounter*." P. 306-12, paragraph [3]. However, if appellant injected the issue the

court must instruct even if the offered instruction is not in proper form. State v. Albanese, 920 S.W.2d 917, 922 (Mo.App. 1996).

Standard of Review

A self-defense instruction must be given if there is substantial evidence to support it. Substantial evidence means evidence putting the matter in issue, even if inconsistent with the defendant's own testimony. On review the evidence must be viewed in the light most favorable to the defendant. State v. Avery, 120 S.W.3d 196, 200 (Mo. Banc 2003).

Submissible Case

Self-defense has four elements: (1) absence of aggression; (2) real or apparent necessity to kill to save herself from death or serious bodily injury; (3) reasonable cause for belief in such necessity; and (4) attempt to do all in her power consistent with her own safety to avoid the danger and the need to take life. Avery, 120 S.W.3d at 200-1; sec. 563.031, RSMo.

Aggression. Accepting her testimony, Ms. Thomas was not the aggressor. The only mystery is why, once Anthony had closed the door and she was out on the landing, she tried to go back in (T. 440-1). She gave no reason, but if her purpose was lawful she was entitled to go back into her own apartment without forfeiting her right of self-defense. State v. Malone, 39 S.W.2d 786, 789, 794 (Mo. 1931). It was for the jury to draw the inference of what her intent was. State v. Gaskins, 66 S.W.3d 110, 115 (Mo.App. 2001).

The fact that she had stabbed him two and a half months earlier was too remote to make her the aggressor on this occasion. There was evidence that he had beaten her fairly severely on Sept. 19 (T. 412-3, 419), which was relevant to the issues of who was the aggressor and the reasonableness of her apprehension on Dec. 2. State v. Peoples, 621 S.W.2d 324, 327-8 (Mo.App. 1981).

Judge Crahan of the Eastern District dissented solely on the ground that Ms. Thomas forfeited her right of self-defense by renewing the altercation, thus becoming the aggressor. He cited two cases, which the majority distinguished in footnote 1 of its opinion (slip op. 4).

In State v. Adkins, 537 S.W.2d 246 (Mo.App. 1976), the altercation took place in a car. The victim was behind the wheel, suggesting the car was hers. Defendant left the car, then reentered and stabbed the victim to death. There was no suggestion that she was armed. Adkins testified that he was entirely innocent. 537 S.W.2d at 247-8. There was no evidence for anything but an unambiguous inference that he renewed the attack and could not be justified.

In State v. Henson, 552 S.W.2d 378 (Mo.App. 1977), defendant and victim got into an argument in a trailer the victim shared with defendant's mother, the victim's grandmother. There was evidence on behalf of the defense that the victim brandished a butcher knife at defendant. Henson left only long enough to fetch a gun from his car. On reentering the trailer he shot the victim. 557 S.W.2d at 379-80. Again, the inference is unambiguous that he renewed the altercation with aggressive intent.

A self-defense instruction "must be based upon substantial evidence and the reasonable inferences therefrom." State v. Westfall, 75 S.W.3d 278, 280 (Mo. Banc 2002). Aggression is not the obvious inference from Ms. Thomas's testimony. She was returning to her own apartment where she had a right to be. She was in the process of moving out and may well have intended to retrieve more clothing or other belongings. She had not left the apartment to arm herself; she already had the knife, and this was consistent with self-protection rather than aggression. If she "intended only in good faith to ask deceased to stop abusing and threatening [her]. . . and did not address deceased for the purpose of provoking an assault by deceased in order that [she] might have an excuse for killing or injuring him, then [her] right of self-defense was not forfeited or abridged." Malone, 39 S.W.2d at 794. Renewal of the battle was not her only possible intention. Whether she had become the aggressor was a question for the jury.

Necessity. One may not use deadly force against a simple assault and battery; however, it does not follow that the victim must be armed. State v. Albanese, 920 S.W.2d at 924 fn. 3 (overruled on other grounds by Beeler, 12 S.W.3d at 298); State v. Gaskins, 66 S.W.3d at 115 (in which the victim hit defendant in the face and was advancing on him in a threatening manner when defendant shot him). The question is whether she could reasonably apprehend serious physical injury. He came at her with his fist up (T. 440) and "would have hit me" (T. 486), possibly knocking her down the stairs.

Reasonable cause. His slap (T. 435-6, 463), raised fist and prior beating of her supported this element. State v. Hicks, 438 S.W.2d 215, 218-9 (Mo. 1969). The size difference, though not sufficient in itself, was another factor. Hicks; State v. Chambers, 671 S.W.2d 781, 783 (Mo. Banc 1984). The reasonableness of her belief in the necessity to use force was a question for the jury. Chambers, 671 S.W.2d at 783.

It is also legitimate self-defense to use a weapon against someone who, though unarmed, is attempting to take it from the defendant. Avery. 120 S.W.3d at 200; State v. Hayes, 88 S.W.3d 47, 54, 59 (Mo.App. 2002). Mr. Jefferson had threatened to make her "eat that knife" (T. 436) and it was a reasonable inference that he was attempting to make good on that threat when she stabbed him.

Avoidance. Even if she could have retreated down the steps the reasonableness of alternative conduct is within the jury's discretion. Chambers, 671 S.W.2d at 783-4. According to her testimony, to back up farther and fall down the stairs would not have been consistent with her own safety (T. 486).

Self-defense and involuntary manslaughter are not logically inconsistent, therefore both may be based on the defendant's testimony. Beeler, 12 S.W.3d at 300. The jury were not bound by her own description of her mental state, State v. Hayes, 88 S.W.3d at 58; they could accept parts of her testimony and reject others, drawing such reasonable inferences as the evidence permitted. State v. Reynolds, 72 S.W.3d 301, 306 (Mo.App. 2002).

Reynolds has some similar factual elements. The defendant had had prior physical altercations with the victim and knew him to be skilled at martial arts. He testified that the victim grabbed him by the neck and shoved him, then kicked him and took his knife, but Reynolds got it back and stabbed him. The Southern District held that it was plain error not to instruct on self-defense, noting the victim's threatening manner which culminated in a physical assault on the defendant. 72 S.W.3d at 306.

In State v. Gaskins, the victim never had possession of the weapon; he pushed the defendant in the face and was advancing on him in a threatening manner when defendant shot him. This raised the issue of self-defense. 66 S.W.3d at 115.

Avery and Gaskins demonstrate how an unarmed victim can pose enough of a threat to justify resort to deadly force. Given Ms. Thomas's woman's disadvantage against a large, intoxicated and belligerent man who had beaten her before it was reversible error to forbid the jury to consider whether by intentionally stabbing him she was not acting in legitimate self-defense.

III

THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT ON VOLUNTARY MANSLAUGHTER BECAUSE THERE WAS A BASIS IN THE EVIDENCE FOR ACQUITTING MS. THOMAS OF MURDER AND CONVICTING HER OF ACTING IN SUDDEN PASSION BASED ON ADEQUATE CAUSE, IN THAT THE VICTIM'S QUARREL WITH HER, HIS PHYSICAL ASSAULTS, BELLIGERENT MANNER, AND MENACING STEP IN HER DIRECTION WITH A POSSIBLE VIEW TO HITTING HER OR TURNING THE KNIFE AGAINST HER WERE SUFFICIENT PROVOCATION TO SUBSTANTIALLY IMPAIR AN ORDINARY PERSON'S CAPACITY FOR SELF-CONTROL.

No instruction on voluntary manslaughter was offered or given. Nevertheless Appellant advances the issue as plain error. Voluntary manslaughter is a homicide that would otherwise be second-degree murder except that it was done "under the influence of sudden passion arising from adequate cause." Sec. 565.023.1(1).

"'Adequate cause' means cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control." Sec. 565.002(1).

"'Sudden passion' means passion directly caused by and arising out of provocation by the victim…which passion arises at the time of the offense and is not solely the result of former provocation." Sec. 565.002(7).

Voluntary manslaughter is a lesser included offense of murder second. Sec. 565.025.2(2)(a). Under MAI sudden passion is submitted only in the instruction on second-degree murder. Paragraph 3 on sudden passion *must* be submitted if supported by evidence (i.e., defendant has injected the issue). MAI-CR3d 313.04, Note on Use 4. If a separate instruction is given on voluntary manslaughter it will be identical to 313.04 as to the elements of the offense but will *omit* sudden passion. MAI-CR3d 313.08, Note on Use 3. The form instructions are set out in the Appendix (A7-A10). As to the elements of the offense, 313.04 would read:

> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about December 2, 2001, in the City of St. Louis, State of Missouri, the defendant caused the death of Edward Jefferson by stabbing him, and
>
> Second, that it was the defendant's purpose to cause serious physical injury to or to cause the death of Edward Jefferson, and
>
> Third, that the defendant did not do so under the influence of sudden passion arising from adequate cause,
>
> Then you will find the defendant guilty under Count I of murder in the second degree.

Standard of review

An instruction was required if the evidence, by fact or inference, provided a basis for acquittal of murder second and conviction of voluntary manslaughter. The court should resolve doubts in favor of instructing down. State v. Avery, 120 S.W.3d 196, 205 (Mo. Banc 2003).

For instructional error to rise to the level of plain error, the court must have so failed to instruct the jury that the error resulted in manifest injustice or a miscarriage of justice. State v. Ludwig 18 S.W.3d 139, 142 (Mo.App. 2000).

Submissible Case

Defendant had the burden of injecting the issue. Words alone are insufficient to show adequate cause but little more —a mere tweaking of the nose—is required. Former provocation does not give rise to sudden passion if there has been time for the passion to cool. Avery, 120 S.W.3d at 205-6. Passion is an objective standard measured by an ordinary person's capacity for self-control. It may be rage, anger or terror but must be so extreme that for the moment passion supplants reason. State v. Battle, 32 S.W.3d 193, 197 (Mo.App. 2000).

Ms. Thomas testified that she remained calm (T. 451), but Tarynn Johnson testified that Kanita and Anthony argued (T. 323, 325, 336, 341). This, while insufficient, contributes to sudden passion. State v. Fouts, 939 S.W.2d 506, 511 (Mo.App. 1997). Ms. Thomas testified that he smacked her (T. 435-6, 463), told Johnson, "Get that bitch out of here" (T. 434-5), paced the floor and stared Ms. Thomas in the eyes (T. 435), flipped the mattress over (T. 437, 479-80) and

threatened to make her eat the knife (T. 436). When she reopened the door from outside he came toward her with his fist up (T. 440) and "would have hit me" (T. 486).

On this evidence Ms. Thomas had adequate cause to fear a beating at his hands. Avery, 120 S.W.3d at 206. The beating he administered on Sept. 19 was relevant in contributing to her sudden passion on Dec. 2. *Id*. at 205-6; Fouts, 939 S.W.2d at 511. The victim's size, the same as in State v. Craig, 33 S.W.3d 597, 601 (Mo.App. 2001), was another factor. Anthony's threats and hostility on Dec. 2 were close enough in time to constitute a continuing course of conduct, leaving no time for Ms. Thomas's passion to cool. Battle, 32 S.W.2d at 197.

As required by the statutes, the provocation was immediate and proceeded from the victim. Given all that had gone before, when he walked menacingly toward her he induced fear that would have substantially impaired an ordinary person's capacity for self-control.

Ms. Thomas's undenied stabbing of the victim on Sept. 19 and arming herself on Dec. 2 were not inconsistent; a jury could find that "under the influence of [victim's] provocation" any intention on her part to harm him "developed into a reactional striking of [victim]." State v. Fears, 803 S.W.2d 605, 609 (Mo. Banc 1991).

In Avery the female defendant testified that she shot the male victim, unintentionally, as he entered her house threatening to beat her. The Supreme Court found the evidence "minimally sufficient" to inject the issue of sudden

passion. 120 S.W.3d at 206. In that case the balance was heavily on the side of former provocation "from events well before the shooting." 120 S.W.3d at 205. In this case the balance was the other way; there was one prior incident and, on Dec. 2, a building up of hostility and menace on the victim's part leading to a bursting out of sudden passion in Ms. Thomas.

By failing to submit voluntary manslaughter the trial court denied the jury the opportunity to consider a verdict of a viable lesser offense, a failure to instruct that reached the level of plain error. State v. Ludwig, 18 S.W.3d at 142-3.

IV

THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO APPELLANT'S QUESTION TO TARYNN JOHNSON, WHETHER SHE'D EVER BEEN CONVICTED OF A CRIME, BECAUSE APPELLANT HAD AN ABSOLUTE RIGHT TO CROSS-EXAMINE ON THIS SUBJECT FOR IMPEACHMENT IN THAT THE QUESTION WAS PROPER IN FORM AND ASKED IN GOOD FAITH ON THE BASIS OF INFORMATION FROM APPELLANT, A FRIEND OF THE WITNESS. THE RULING DENIED APPELLANT HER CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESS AGAINST HER.

The motion for new trial (L.F. 78-80) preserves this issue which arose on cross-examination of Tarynn Johnson:

> Q Have you ever been convicted of a crime?
>
> MS. BOARDMAN [Prosecutor]: I'm going to object to that, Your Honor.
>
> THE COURT: Approach the bench…Has she ever been convicted of a crime?
>
> MS OFFERMAN [defense counsel]: Yeah.
>
> THE COURT: What for?
>
> MS. BOARDMAN: I've never been made aware of that.
>
> THE COURT: Where did you get that information from?

MS. OFFERMAN: From my client.

THE COURT: Ms. Offerman, unless you have a certified copy of a sentencing and judgment, you can not do that now. I'm going to sustain that objection. Have you run this lady?

MS. BOARDMAN: I believe that my investigator hasn't run everybody, and I haven't any information. If she has any conviction, I'm not aware of it. And I don't know—where is this supposed to have been?

MS. OFFERMAN: I don't know.

THE COURT: This—

MS. OFFERMAN: It is perfectly legitimate.

THE COURT: This is not a fishing expedition. You ask a question—if you ask her a question like that, you'd better know the answer to it. Unless you know the answer to it, unless you're telling me you know the answer to it, you can't ask that question.

MS. OFFERMAN: Well, my client answered it.

THE COURT: I'm telling you, you have to take responsibility for what you ask.

MS. OFFERMAN: Well, Your Honor, we don't have the ability to run record checks.

THE COURT: Well, keep her on. She will stay on her subpoena, but I will not permit you to ask her a question unless you know the answer to it. (T. 354-6)

The point is governed by sec. 491.050, RSMo (A11) which allows any witness to be impeached by a prior conviction or finding of guilty. "Such proof may be *either by the record or his own cross-examination*" (emphasis added).

Standard of Review

The statute has been interpreted to confer an absolute right to ask the question that was put to this witness; discretion extends only to the scope of cross-examination. State v. Simmons, 825 S.W.2d 361, 364 (Mo.App. 1992). Abuse of discretion is therefore not the standard; the error is patent, and the only possible questions on appeal are the form and good faith of the question and harmless error. State v. Moore, 84 S.W.3d 564, 568 (Mo.App. 2002).

Discussion

It has been settled for a long time that a party need not have a record of conviction to be entitled to ask the question. State v. Miller, 100 Mo. 606, 13 S.W. 832, 836 (1890); State v. Owens, 628 S.W.2d 349 (Mo. 1982). This follows from the language of the statute: proof of conviction may be either by the record or by cross-examination.

Bad faith is not inferred from the absence of a documentary foundation. State v. Weber, 814 S.W.2d 298, 302 (Mo.App. 1991). A good faith basis has been found in a notation on a Recognizance Bond Evaluation, Owens, 628 S.W.2d at 350; and in an "index record of arrest." State v. Ware, 449 S.W.2d 624, 626 (Mo. 1970).

Defense counsel's source of information was her client who was a good friend of the witness (T. 334) and had known her since Ms. Johnson was seven or eight (T. 318). She was in a position to know. This was an adequate basis for the exercise of Ms. Thomas's absolute right.

In State v. Meyer, 473 S.W.2d 374 (Mo. 1971), the trial court refused to allow the defendant to ask his accomplice if he'd ever been convicted of a crime. No basis appeared for the question or for the ruling, except perhaps that because the witness was 17 the question might refer to juvenile proceedings. The Supreme Court reversed for prejudicial restriction of the constitutional right to confrontation. Mo. Constitution Art. I, sec. 18(a); U.S. Constitution, Amendments VI and XIV.

The issue usually arises on cross-examination of the defendant, but reversible error was also found in sustaining an objection to defense examination of a state's witness in State v. Taylor, 118 Mo. 153, 24 S.W. 449 (1893). The error was prejudicial because the witness was the principal one the state used to place the defendant in the vicinity of the rape. 24 S.W. at 450-1.

Tarynn Johnson was not an eyewitness but as close as you can get to being one. Whether she refuted or corroborated Ms. Thomas's statements and testimony was key. She did not see Mr. Edwards slap Ms. Thomas (T. 332) but only admitted that it could have happened (T. 339). She didn't remember him flipping the mattress (T. 339). She testified that Ms. Thomas came out of the apartment and said, "I stuck him" (T. 328-9); she did not scream it (T. 349-50). This differed

from Ms. Thomas's testimony that she stabbed him while she was outside the apartment and he was just inside (T. 440-1). The prosecutor argued to the jury that Ms. Johnson's version was the truth (T. 533-4) while defense counsel argued that she was not a credible witness (T. 527).

Ms. Thomas testified that Ms. Johnson lied when she said she saw him fall (T. 468-9). She also contradicted Ms. Johnson's testimony that Ms. Thomas left the apartment twice before the stabbing and handed her a jacket and bag; she testified that she had them in her own possession when the victim reemerged and fell onto the landing (T. 471-2); if she gave them to Ms. Johnson it created a stronger inference that she went back in with intent to kill. These were differences in testimony on critical points, and if the jury had been given reason to doubt Ms. Johnson's credibility the outcome could have been different.

CONCLUSION

Wherefore appellant prays the Court to reverse the judgment and discharge her, or remand the cause for a new trial. Because armed criminal action includes the offense of murder in Count I, Count II must also be reversed. State v. Avery, 120 S.W.3d at 206.

Respectfully submitted,

_____
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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned counsel certifies that this brief complies with Rule 84.06(b); that it contains 8,039 words all-inclusive; and that it is accompanied by a disk which has been scanned for viruses by Norton Antivirus and is virus-free.

One copy of this brief, and a copy of the brief on disk, have been mailed to the Attorney General, attorney for Respondent, this _____ day of December, 2004.

_____
HENRY B. ROBERTSON
Attorney for Appellant

APPENDIX

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